itself, in connection with the publicly known circumstances under which it was written, shows at once that the article referred to someone else than the person named, while in *Sweet v. Post Pub. Co., supra,* it was in effect conceded at the trial that the plaintiff was the person meant, although the naming of him was due to a mistake. See 47 L. R. A. (N. S.) 240, Ann. Cas. 1914 D, 533.

MASTER AND SERVANT—LIABILITY OF MASTER FOR NEGLIGENCE OF BORROWED SERVANT.—A sub-contracting company, which was under agreement to excavate for construction work, contracted with a trucking company to furnish necessary motor trucks. The trucking company hired several additional trucks with drivers from a truck renting corporation. One of these trucks so hired, in the course of work, ran over plaintiff's intestate, a pedestrian. The action was originally brought against all three companies as defendants, but was dismissed as to the truck renting corporation, so that the only question which presented itself on appeal was the location of the burden of liability as between the sub-contractors and the trucking company. *Held,* driver of the truck was not at the time a servant of the sub-contractor nor of the truck renting corporation, but immediately employed by the trucking company, which was liable for the accident. *Wagner v. Motor Truck Renting Corporation et al.* (N. Y.), 136 N. E. 229.

In the instant case the negligence of the driver was admitted and no claim was made that deceased was guilty of contributory negligence. The case turned entirely upon the question, by whom was the driver employed at the time his negligence caused the death. It is a general legal principle, often affirmed, that one is not accountable to third persons for injuries caused by negligence of a servant in performance of an undertaking, unless the relation of master and servant existed between the wrongdoer and the one to be held liable. *Patton v. McDonald,* 204 Pa. 517; *Beard v. Omnibus Co.* [1900], 2 Q. B. 530. The class into which the principal case appears to fall includes those situations where the general master may lend his servant to another so that the latter becomes responsible for the servant's negligence. *Brown v. Smith & Kelly,* 86 Ga. 274; *Cunningham v. Improvement Co.,* 20 N. Y. App. Div. 171. Conversely, the general master may remain responsible for the unlawful acts of his servant in some cases where a second and special employment is involved. *Quarman v. Burnett,* 6 M. & W. 499; *Joslin v. Ice Co.,* 50 Mich. 516; *Lewis v. L. I. Ry. Co.,* 162 N. Y. 52. The fact of a master's liability under the principles indicated in the enumerated cases is uncontested. The difficulty for the courts has come in the application of that liability to the facts of a stated case. Out of considerable confusion at least one clear test, that of power of control, has been evolved. *Standard Oil Co. v. Anderson,* 212 U. S. 215; *Ash v. Lumber Co.,* 153 Iowa 523. Other cases have been referred to as formulating further tests, that of power to discharge, *Construction Co. v. Hansen,* 176 Ill. 100, and in whose business servant was engaged. *Kimball v. Cushman,* 103 Mass. 194; *D., L. & W. Ry. v. Hardy,* 59 N. J. L. 35; *Parkhurst v. Swift,* 31 Ind. App. 521. In reality, however, such decisions make these

latter tests secondary, as indications only of where the ultimate power of control over servants rests, which accordingly becomes determining in the decision of all these actions. Though the reasons upon which the majority in the principal case rested their opinion are not clearly defined, it is evident that they decided with regard to the location of the directing power upon the facts as found by the lower court. The test observed is cited in *Muldoon v. Fireproofing Co.*, 134 N. Y. App. Div. 453, as the primary one for application in such situations. That the disagreement of the dissenting judges is solely upon the application of legal rule to the facts is apparent from the absence of argument in that opinion. The conditions in the instant case are similar to those in *Schmedes v. Deffaa*, 138 N. Y. Supp. 931, where the intermediate party was held not liable. Our later decision, however, may be justified on the basis that the facts show the power of control to have been in the trucking company, and hence it was their business rather than that of the excavation company in which the driver was engaged when the accident occurred, though incidentally the contract of the sub-contractors was being furthered. See 11 MICH. L. REV. 414.

MASTER AND SERVANT—SCOPE OF EMPLOYMENT—WHEN RESUMED AFTER DEPARTURE.—The driver of defendant's truck, after making the last delivery for the day, drove the truck to his home and used it for moving furniture and other household duties for himself. When he was returning defendant's truck to defendant's garage six hours later he negligently ran into and injured plaintiff. In an action for damages against the employer it was *held*, the servant was not acting within the scope of his employment and the master was not liable. *Cannon v. Goodyear Tire and Rubber Co. of California* (Utah, 1922), 208 Pac. 519.

It was conceded in the case that there had been a clear departure from the scope of the servant's employment. The precise question was whether or not the servant had resumed the service of the master upon starting back to the garage where it was his duty to leave the car for the night. The great weight of authority is with the principal case in holding that when there has been a departure the service of the master is not resumed until the servant has, at least, reached the place where the deviation occurred or a corresponding place. MECHEM, § 1907; HUDDY ON AUTOMOBILES, § 284; BERRY ON LAW OF AUTOMOBILES, §§ 1054, 1072, *seq. Fleischner v. Durgin*, 207 Mass. 435; *Ludberg v. Barghoorn*, 73 Wash. 476; *Solomon v. Trust Co.* (Penn.) 100 Atl. 534; *Cavanagh v. Dinsmore*, 12 Hun (N. Y.) 465; *Symington v. Sipes*, 121 Md. 313; *Danforth v. Fisher*, 75 N. H. 111. Many cases go even farther and seem to lay down the rule that in order to be considered within the scope of his employment the servant must have reached the destination to which he was bound when the deviation occurred. *Colwell v. Aetna Bottle and S. Co.*, 33 R. I. 531; *Hartnett v. Gryzmish*, 218 Mass. 258; *Brinkman v. Zuckerman*, 192 Mich. 624. Little authority can be found to the effect that the servant resumes his employment when he starts back to the service of his master. *Missouri, etc., Ry. Co. v. Edwards* (Tex.), 67 S. W. 891; *Chicago, etc., Co. v. McGinnis*, 86 Ill. App. 38; *Bar-*